IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-212

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,

Petitioner,

—v.—

DANIEL P. MURPHY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

MELVIN L. WULF
BURT NEUBORNE
JOEL M. GORA
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

Attorneys for Amicus Curiae

TABLE OF CONTENTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-212

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,

Petitioner,

—v.—

DANIEL P. MURPHY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus**

The American Civil Liberties Union is a nationwide, non-partisan organization of over 170,000 members solely dedicated to defending the liberties guaranteed by the Bill of Rights. One of the most vital of those civil liberties is the right of privacy premised on the Fourth Amendment and reinforced by other Amendments as well. As a result

* Letters of consent to the filing of this brief have been filed with the Clerk. In addition, counsel for the petitioner has orally consented to the late filing of this brief and has been provided with a typed manuscript.

of our concern with this central constitutional safeguard, which nourishes so many of our society's other values, we have participated in many of this Court's cases which have defined the scope of Fourth Amendment protection. Most relevantly, we filed briefs amicus curiae in *Terry* v. *Ohio,* 392 U.S. 1 (1968), *Sibron* v. *New York,* 392 U.S. 40 (1968), and *Adams* v. *Williams,* 407 U.S. 143 (1972).

The purpose of this brief is to suggest to the Court the larger doctrinal context in which the specific issue must be decided. It has been suggested that Fourth Amendment limitations be relaxed in this case to accommodate a "common sense" approach to the reasonableness of police practices. That is why it is vital for this Court to reaffirm the vigor of those safeguards.

ARGUMENT

Introduction

Criminal cases posing Fourth Amendment issues are merely the visible tip of an iceberg of police-citizen encounters. While the immediate issue before the Court in this case is the admissibility of evidence in one criminal trial, the impact of this Court's Fourth Amendment decisions—and the guidelines they embody—are felt with astonishing immediacy by millions of law abiding Americans. Indeed, the sense of privacy and personal dignity which is the hallmark of a free society depends in large part upon the extent to which this Court is successful in resisting the "hydraulic pressures" to skimp on the Fourth Amendment. E.g., *Boyd* v. *United States,* 116 U.S. 616, 635 (1886); *Johnson* v. *United States,* 333 U.S. 10, 13-14 (1948).

The broad charter sought by petitioner to conduct warrantless investigative searches, must not be permitted to undercut the "right to be let alone"[1] embodied in the Fourth Amendment.

I.

No probable cause existed to subject respondent to a search.

All concede that, in the absence of probable cause, the police search of the respondent would clearly violate the Fourth Amendment. E.g., *Davis* v. *Mississippi,* 394 U.S. 721 (1969); *Vale* v. *Louisiana,* 399 U.S. 30 (1970). While this Court has sanctioned defensive frisks on less than probable cause in the context of street encounters posing a danger to an investigating officer, it has staunchly resisted attempts to dilute the quantum of evidence necessary to justify a search on probable cause within the meaning of the Fourth Amendment. Compare *Terry* v. *Ohio,* 392 U.S. 1 (1968) with *Spinelli* v. *United States,* 393 U.S. 410 (1969) and *Aguilar* v. *Texas,* 378 U.S. 108 (1964). Since, at best, the information available to the police when they searched respondent amounted to "articulable suspicion" rather than probable cause, it could not authorize the search to which he was subjected.

In *Terry* v. *Ohio, supra,* and *Adams* v. *Williams,* 407 U.S. 143 (1972), this Court recognized that the suspicious activity of the individuals involved, while justifying a reasonable suspicion, did not satisfy traditional notions of proba-

---

[1] *Olmstead* v. *United States,* 277 U.S. 438, 478 (1928) (dissenting opinion of Mr. Justice Brandeis).

ble cause. See also, e.g., *Beck* v. *Ohio,* 379 U.S. 89 (1964); *Rios* v. *United States,* 364 U.S. 253 (1960); and *Henry* v. *United States,* 361 U.S. 98 (1959). A comparison of the basis for the search herein with the material available to the police in *Terry, Adams, Rios, Beck* and *Henry,* reveals that, despite the petitioner's protestations to the contrary, the police did not possess probable cause to believe that the respondent was guilty of murder. Apart from respondent's admission that he was separated from his wife and in the vicinity of her home on the night of her murder, the police had no concrete evidence implicating him. Clearly, while additional investigation was warranted, reasonable suspicion had not ripened into probable cause. If the quantum of evidence available to the police at the time they searched the respondent is thought to have constituted probable cause, then the role of a magistrate and the significance of a warrant will be reduced to bureaucratic formalities, since it would be difficult to conceive of a situation in which a warrant would not issue. In effect, the result would be that the quantum of evidence necessary to justify an invasion of a citizen's privacy by the police would be reduced from probable cause to mere hunch or suspicion.

The most telling evidence that no probable cause existed is the unexplained failure of the police to seek a search warrant or to place respondent under arrest.[2] It is hardly to be supposed that Oregon authorities blithely permitted a murder suspect to remain at large for over a month despite their belief that probable cause existed to

---

[2] Compare *Chambers* v. *Maroney,* 399 U.S. 42 (1970) and *Vale* v. *Louisiana,* 399 U.S. 30 (1970), where the police officers' contemporaneous actions testified to their belief that probable cause existed.

arrest him. Petitioner's understandable *post hoc* attempt to erect a probable cause justification for the exploratory search must not be permitted to obscure the fact that all parties testified by their contemporaneous behavior that no probable cause existed to conduct the search in question.

II.

The search of respondent was not authorized by a neutral magistrate and was therefore unlawful.

Petitioner argues broadly that police should be permitted to conduct warrantless searches whenever they believe that probable cause exists and that evidence may be destroyed unless an immediate search is undertaken. Since such an "exception" to the Fourth Amendment rule requiring a finding of probable cause by a detached, neutral magistrate prior to a search would, in effect, swallow the rule, it is not surprising that petitioner's contention has been emphatically rejected by this Court. E.g., *Vale* v. *Louisiana, supra.*

In *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971), this Court reiterated its repeated holding that a policeman's good faith belief that probable cause exists cannot justify a warrantless search in the absence of narrowly circumscribed "exigent circumstances." As this Court has repeatedly held:

> ". . . searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." [3] The exceptions are "jealously

[3] *Coolidge* v. *New Hampshire,* 403 U.S. at 455, quoting from *Katz* v. *United States,* 389 U.S. 347, 357 (1967).

and carefully drawn" [4] and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that cause *imperative.*" [5] *Coolidge* v. *New Hampshire,* 403 U.S. at 455 (emphasis added).

Thus, in order to justify the concededly warrantless search of respondent, petitioner must demonstrate that the exigencies of the situation made that course "imperative."

In *Vale* v. *Louisiana, supra,* this Court refused to sanction the warrantless search of a dwelling despite the existence of probable cause, and despite the good faith fears of the police that unless an immediate warrantless search were conducted, evidence might well be destroyed. As this Court noted, the existence of alternative procedures by which the evidence could be safeguarded and a warrant secured removed the case from the "exigent circumstances" exception.

In the instant case, this Court is confronted not with the warrantless search of a dwelling as in *Vale,* nor with the warrantless search of an automobile as in *Chambers* v. *Maroney,* 399 U.S. 42 (1970), but with a warrantless search of the person. While contemporary notions of zones of expected privacy might arguably justify this Court's relaxation of a warrant requirement for probable cause searches of automobiles on the public highway,[6] the core values underlying the Fourth Amendment would be severely imperiled if a similar relaxation were permitted for warrant-

---

[4] *Coolidge* v. *New Hampshire, supra,* quoting from *Jones* v. *United States,* 357 U.S. 493, 499 (1958).

[5] *Coolidge* v. *New Hampshire, supra,* quoting from *McDonald* v. *United States,* 335 U.S. 451, 456 (1948).

[6] E.g., *Carroll* v. *United States,* 267 U.S. 132 (1925), *Chambers* v. *Maroney, supra;* see generally, *Katz* v. *United States,* 389 U.S. 347 at 351 (1967).

less searches of the person. The fact that the Court in *Vale* refused to sanction a relaxation of the warrant requirement in the context of searches of dwellings, and in *Coolidge* refused to extend *Chambers* to automobiles not in transit on a public highway, demands strict adherence to warrant requirements when what is at stake is the physical invasion, not merely of a dwelling or an automobile, but of the person itself.

Petitioner seeks to avoid the impact of the Fourth Amendment by arguing that an immediate warrantless search of respondent was "imperative" in order to prevent the destruction of evidence. However, just as the good faith fears of the police officers in *Vale* could not sanction a warrantless search of a residence, so petitioner's fears did not justify the warrantless search of respondent, since a number of alternatives existed whereby the evidence in question could have been safeguarded pending an application for a search warrant.

First, petitioner concedes that one of the elementary police techniques in any strangulation investigation is to check the fingernails of suspects for incriminating evidence. Indeed, in interrogating respondent's son immediately after the discovery of the body, the police visually scanned his fingernails and determined that they were too short to have caused the scratches in question. Thus, the police were aware from the very inception of their investigation that it might become necessary to investigate respondent's fingernails were he to become a suspect. As the record indicates, despite the fact that by 4 P.M. the police were in possession of every piece of evidence which they now contend constituted probable cause to search respondent, they failed to seek judicial authorization for their search

during the 5-6 hours that elapsed between respondent's emergence, in police eyes, as a prime suspect at 4 P.M., and the actual search, which occurred between 9-10 P.M.[7] The existence of this classic alternative to the exploratory, warrantless search at issue herein, clearly removes this case from the exigent circumstances doctrine.

But even if one assumes—contrary to the record—that the police officers' perception of respondent as a prime suspect did not ripen until immediately prior to the search (thus rendering it difficult to obtain prior judicial sanction for the search), the police, assuming they had probable cause, should nevertheless have been required to arrest respondent and could then have subjected him to an appropriately narrow search incident to his arrest. *Chimel* v. *California*, 395 U.S. 752 (1969). Instead, petitioner urges that the "lesser intrusion" of a search is preferable to an arrest, and that, therefore, the warrantless seizure of the evidence was proper. However, by permitting warrantless "lesser intrusions" instead of an arrest, this Court would be encouraging police-citizen contacts on less than probable cause. For, while experience teaches us that arrests—with the substantial collateral formalities involved—are rarely indulged in without a good faith belief that probable cause exists, "lesser intrusions"—with their inherent low visibility—are epidemically initiated on mere hunch or suspicion. Thus, the requirement that a police officer bear witness to his belief that probable cause exists by initiating the formal process of arrest, operates as a

[7] Respondent suggests that this unexplained failure to seek judicial sanction for a search which petitioner insists was based upon probable cause stems not from a desire on the part of the police to avoid the warrant process, nor from incompetence, but from the contemporaneous realization by all concerned that no probable cause existed to conduct a search of respondent at that time.

critical self-executing check upon the practice of warrantless exploratory searches, the ultimate validity of which will always be subject to the vagaries of "hindsight judgment." *Beck* v. *Ohio,* 379 U.S. 89, 96 (1964). Indeed, the conduct of the police in this case in failing to arrest respondent demonstrates that, when probable cause is doubtful, police are far more reluctant to initiate an arrest than to engage in an exploratory search in the guise of a "lesser intrusion."

CONCLUSION

The failure of the police to utilize either a warrant or a search incident to an arrest in this case is, of course, closely connected to the absence of probable cause. In fact, petitioner's plea of exigent circumstances flows not from the "imperative" need for a warrantless search but from the lack of any basis upon which a warrant could have been secured. Petitioner's complaint, therefore, is not directed to the requirement of prior neutral scrutiny but rather to the principle that, in our society, exploratory searches are simply not permitted on the basis of good faith police suspicion which does not rise to the level of probable cause.

Respectfully submitted,

MELVIN L. WULF
BURT NEUBORNE
JOEL M. GORA
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

Attorneys for Amicus Curiae

March, 1973